

No. 12011.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ESTATE OF JOHN E. BURRELL, Deceased, ARLEY M. BURRELL, Executrix,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Review of the Decision of the Tax Court
of the United States.

PETITIONER'S OPENING BRIEF.

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PETITIONER'S OPENING BRIEF.

Opinion Below.

The opinion of the Tax Court is a Memorandum Decision and is reported at Par. 48,051 P-H Memo T. C.

Jurisdiction.

The petition herein is to review the decision of the Tax Court of the United States involving petitioner's estate tax return.

The jurisdiction of the Tax Court is based upon Section 871(a) of the Internal Revenue Code. The jurisdiction of this Court is based upon Sections 1141 and 1142 of the Internal Revenue Code.

Petitioner's Federal estate tax return indicating an assessment of \$6,408.18 was filed with the Collector of

Internal Revenue for the Sixth District of California, at Los Angeles, September 15, 1944. Respondent determined a deficiency in petitioner's estate tax in the amount of \$2,199.80, and notified petitioner of this deficiency under date of May 29, 1946 [R. 10]. Petition for redetermination was filed with the Tax Court on August 26, 1946 [R. 20].

The Tax Court (per Disney, Judge) promulgated its Memorandum Findings of Fact and Opinion on April 6, 1948 [R. 22]. The Decision of the Tax Court, pursuant to said Findings of Fact and Opinion, that there is a deficiency in estate taxes in the amount of \$2,199.80 was entered on April 7, 1948 [R. 30]. Petitioner's petition for review was filed on July 6, 1948 [R. 30].

Question Presented.

Has a wife who is a surviving joint tenant of her deceased husband in a community property state made a contribution to the jointly owned property of the spouses to the extent of community income taxes paid by her where the jointly owned property is traceable to the husband's earnings but the gross amount of the property in the estate at the date of death is accounted for by the fact that community income taxes on his earnings remained to be paid, and half of such taxes were required to be paid by the wife from her separate property after his death as a result of her having filed a separate income tax return under the husband's direction on half of her husband's community earnings?

Statutes and Regulations Involved.

The statutes and regulations involved are as follows:

Internal Revenue Code, Sec. 811(e)(1);

Civil Code of California, Secs. 161(a), and 171.

These statutory provisions and regulations are set forth in the Appendix hereto.

Statement of the Case.

This appeal is solely upon the conclusions of law reached by the Tax Court of the United States.

The controversy involved in this review concerns the petitioner's estate tax. Decedent John E. Burrell died July 28, 1943, a resident of California. His estate tax return to the United States was duly filed by his widow and executrix of his estate, Arley M. Burrell, with the Collector of Internal Revenue, at Los Angeles. Thereafter, the Commissioner of Internal Revenue assessed additional estate taxes against the estate based on disallowance of income taxes on community income of decedent during his lifetime, which were unpaid at the time of his death, to the extent that they were assessed against his wife, Arley M. Burrell. Mrs. Burrell had no separate income but had signed community income tax returns reporting one-half of her husband's income, as is customary in community property states.

The proceeding before the Tax Court of the United States was brought on the alleged error of the Commissioner, among others, in failing to hold that the income taxes remaining to be paid at the time of death by the

wife on the earnings of the decedent were, if not technically allowable as deductions, at least contributions by the wife to the jointly owned property in the name of herself and her husband. John E. Burrell had made a practice of depositing his earnings, which were entirely community, into joint tenancy bank accounts as he withdrew them from his business and, at the time of his death, 85% of his estate was in the form of joint tenancy with his wife, Arley M. Burrell. If the income taxes remaining to be paid by Arley M. Burrell were contributions to the joint tenancy, the interest of the decedent in the joint tenancy property subject to estate tax would be reduced in a like amount.

The Tax Court of the United States decided this issue in favor of the Commissioner April 7, 1948, upon the authority of the *Estate of Benjamin Franklin McGrew*, 46 B. T. A. 623 (decided March 13, 1942), and *Fox v. Rothensies*, 115 F. 2d 42 (C. C. A. 3, decided September 30, 1940). The decision of the Tax Court of the United States is in effect that the payment of the tax by the wife does not constitute an adequate consideration for a claim against or contribution to the estate and, in any event, there was no express or implied contract with the husband for repayment.

The ruling of the Tax Court of the United States in this case is novel and has not been heretofore reviewed by the Circuit Courts.

Specification of Errors Relied Upon.

The points petitioner intends to rely upon on review are as follows:

1. The holding that the question presented to the Court was solely “. . . whether the Commissioner erred in disallowing a deduction of \$10,344.12 from the decedent’s gross estate.”

2. The failure to determine that Arley M. Burrell had made a contribution in the sum of \$10,344.12 to the jointly-owned property of John E. Burrell and Arley M. Burrell.

3. The failure to find that the extent of the interest of the decedent in the jointly-owned property subject to estate taxes was \$99,803.75, being the total of the jointly-owned property in the amount of \$110,-147.87 less the contribution of \$10,344.12 by Arley M. Burrell. (35)

4. The failure to find that the gross estate of the decedent subject to estate taxes amounted to \$123,-791.48.

5. The holding that the “actual net worth of the decedent’s estate—was \$134,135.60.”

6. The failure to find there was under California statutes relative to community property and contractual relations of a husband and wife residing in California at least a presumption the wife acts under the husband’s direction when she signs and files a separate income tax return reporting one-half of the community income of her husband.

7. The finding of a deficiency in the estate tax of decedent’s estate in the amount of \$2,199.80, in lieu of a determination that the estate owes no additional estate taxes.

Summary of Petitioner's Argument.

Petitioner relies on the principle of justice and equity that it is the intent of the Congress to tax the transfer of the true net estate of a decedent. The applicable revenue statutes accomplish this by excluding from the gross jointly-owned estate, if any there be, contributions by the surviving tenant, as well as by allowing deductions from the gross estate for personal debts of the decedent.

Petitioner argues on the factual side that where money or property in an estate can be traced directly to earnings of the decedent on which the income taxes were not fully paid, the estate should be reduced by the amount of the unpaid income taxes. Where the decedent was a married man in a community property state, the foregoing statement should be equally true even though he elected to file separate income tax returns with his wife on his community earnings.

Where the community earnings of the husband prior to his death were converted to jointly-owned property, the true contribution of the husband to the jointly-owned property could not exceed the amount of the earnings less the income taxes thereon. If the amount in the jointly-owned estate exceeds the tax-paid earnings by a sum equal to and traceable to the assumption and payment of the income taxes by the wife and surviving tenant, such sum is the contribution of the wife.

The payment in money of the income tax by the wife on decedent's earnings is a consideration in money's worth from which the estate received a benefit.

The conduct of the husband during his lifetime clearly shows he did not intend the wife to deplete her separate estate when he directed her to file a separate return reporting half of his community earnings. There was no obligation on her under the revenue acts to file such a return, and it should be presumed she acted under the husband's direction in doing so, since he had full control and management of the community property affairs. There is, under California statutes, an implied contract the community will reimburse the wife for outlays from her estate on behalf of the community for other than necessities of life, there being no donative intent on her part.

ARGUMENT.

I.

There Is an Unjust Enrichment of the Decedent's Estate Unless the Wife's Payment of Community Income Taxes on Decedent's Earnings Is Determined to Be a Contribution to the Joint-Tenancy Property Into Which the Decedent Put His Earnings.

The Tax Court determined the gross estate of the decedent to be the sum of \$134,135.60 and to consist of the following types of property [R. 24]:

Community property	
Stocks and bonds	\$ 60.00
Insurance	6,827.25
Property used in decedent's business	17,100.48
	-----\$ 23,987.73
Jointly owned property	110,147.87

Total	\$134,135.60
	=====

It also determined that there were owing by the husband and wife, at the time of decedent's death on July 28, 1943, federal and state income taxes on joint and community earnings as follows [R. 24]:

Husband, John E. Burrell

Federal income taxes year 1941	\$ 166.00	
Federal income taxes year 1942	9,122.54	
California income taxes year		
1942	1,055.58	
		————— \$10,344.12
		=====

Wife, Arley M. Burrell

Federal income taxes year 1941	\$ 166.00	
Federal income taxes year 1942	9,122.54	
California income taxes year		
1942	1,055.58	
		————— \$10,344.12
		=====

It is an equitable principle that the decedent's true estate which could be transferred to a beneficiary is the same whether his 1942 income taxes were paid on March 15, 1943, or whether they were deferred under the installment basis. The Tax Collector would collect the income taxes before distribution and the distributable estate would be the same in either case. The variation from this principle in the Tax Court's determination is shown by the following schedule:

1. Decedent's gross estate on basis of 1942 com- munity income taxes of s p o u s e s being paid March 15, 1943	Community Property	Jointly Owned Property	Total
Investment in con- tracting business, etc.	\$23,987.73	\$ 0	\$ 23,987.73
Accumulation of earn- ings after taxes	0	89,459.63	89,459.63
2. Total of estate if dece- dent had paid the 1942 c o m m u n i t y income taxes March 15, 1943	\$23,987.73	\$ 89,459.63	\$113,447.36
3. Unpaid community in- come taxes of decedent at date of death. (Tax Court allows to the es- tate an offsetting de- duction for these taxes.)	0	10,344.12	10,344.12
4. True gross estate at date of death per petitioner	\$23,987.73	\$ 99,803.75	\$123,791.48
5. Unpaid community in- come taxes of dece- dent's wife at date of death of d e c e d e n t. These taxes were paid by the wife from sepa- rate property. (T a x Court does <i>not</i> allow to the estate an off- setting deduction for these taxes.)	0	10,344.12	10,344.12
6. Estate as determined by Tax Court	\$23,987.73	\$110,147.87	\$134,135.60

It will be seen from the foregoing summary that the true estate of the decedent after the payment of the community income taxes is \$113,447.36 (item 2). It is also clear that the determination of the Tax Court of a gross

estate of \$134,135.60 does not achieve an equitable result when concurrently with such determination it allows but one of the spouses' income taxes as a proper deduction therefrom. This has the effect of enlarging the taxable estate of the decedent for estate tax purposes by the sum of \$10,344.12, which is added to the estate by the respondent and enters into the basis for the deficiency assessment.

The essence of the wife's payment of half the income taxes which were unpaid at the date of death is that it represents a purchase of assets which remained in the estate in the name of joint tenants. The recognition of this purchase on her part as a contribution to the jointly-owned property reduces the decedent's interest in the jointly-owned properties for estate tax purposes as intended by Congress. When the surviving tenant takes the jointly-owned property after the decedent's death, the amount of her purchase or contribution should be returned to her free of estate tax to achieve an equitable result. This is accomplished by fixing the gross estate of the decedent at the sum of \$123,791.48 (item 4). The consistency thereof is as follows:

Community property	
Stocks and bonds	\$ 60.00
Insurance	6,827.25
Property used in decedent's business	17,100.48
	—————\$ 23,987.73
Jointly-owned property	99,803.75
	—————
Total	\$123,791.48
	=====

II.

There Was an Implied Contract From the Husband's Conduct That the Funds of the Community Estate Would Pay for the Wife the Taxes Assessed on Her Community Income Tax Return.

Section 811(e)(1) of the Internal Revenue Code, as amended by the Revenue Act of 1942, provided for the exclusion from the jointly owned interests of a deceased husband of any amount contributed by the surviving tenant or wife to the jointly owned estate providing such amount had not been acquired originally by the surviving wife from her husband for less than an adequate consideration in money or money's worth. The petitioner's contention is that the income taxes on the community income left to be paid by the wife after the death of the husband and which the Tax Court found were paid by her in the regular course after the husband's death [R. 25] were contributions to the joint tenancy estate. The Tax Court held that this theory was not tenable on the ground that there was no express or implied promise by John E. Burrell that the community estate would bear the burden of paying these taxes of his wife [R. 28].

The Tax Court found:

“The decedent and his wife filed separate tax returns in the State of California on their respective shares of joint and community income for the years 1941, 1942 and 1943.” [R. 24.]

It also found:

“Decedent and his wife, Arley M. Burrell, converted their property into joint tenancy during their

marriage, except the portion of their property used in decedent's business," [R. 23],

And,

"That the estate tax return included among assets of the estate bank accounts held in joint tenancy by the decedent and his wife, totaling approximately \$40,000.00." [R. 25.]

It is apparent from these findings that John E. Burrell did provide the means whereby his wife could pay her share of the community income taxes from funds originally community in character by placing the funds in joint-tenancy bank accounts. The intention on his part to pay the wife's taxes had become a fact since the joint-tenancy bank accounts were at her disposal. It is clear he intended her estate to suffer no injury. The husband's conduct during life clearly shows that he recognized his wife should be protected from a personal liability in respect to the community income tax returns filed by her.

In holding there was no evidence that the wife expected protection or repayment from John E. Burrell or the community estate for the payment of the community income taxes, the Tax Court overlooked these salient acts of John E. Burrell during his lifetime and relied upon its own holding in the *Estate of Benjamin Franklin McGrew*, 46 B. T. A. 623, decided March 13, 1942, and *Fox v. Rothensies*, 115 F. 2d 42, C. C. A. 3, decided September 30, 1940. In both of these cases, there were transactions quite foreign to that of the Burrells. There the marital

domiciles were in non-community property states and the husbands and wives were owners of separate property prior to their marriages. During the marriages, properties of the husbands and wives were substantially commingled over a series of years. There were transfers of property from the husbands to the wives for which no accountings were made by the spouses during lifetime. The evidence relative to the transactions behind the transfers was oral and the vagueness of the facts inclined the courts to conclude that the exchanges of properties between the spouses were not on a business basis. The direct testimony of the wives was to the effect that reimbursement for advances was not expected from the husbands.

In the *Burrell* case, there is one single type of transaction between the husband and wife, the filing and payment of community income tax returns for 1941 and 1942. The Tax Court held that there were no statutory gifts between the Burrells [R. 24], and it is clear that Mrs. Burrell had no separate property interests during her lifetime which she could have used to pay her income taxes. It was incumbent upon the husband to provide means for her to pay the taxes which he did through the creation of the joint-tenancy bank accounts.

From a review of the decided cases where the wives had claimed contributions to their joint-tenancy estates with their husbands, it is apparent that the decisions of the courts have turned on two points: first, whether the contributions were clearly provable, and, secondly, whether

transactions between the spouses in their property matters were conducted on a businesslike basis. In *Richardson v. Helvering*, 85 Cal. 2d 548 (C. C. A., decided December 2, 1935), the Court held the wife had made a contribution in money or money's worth to the jointly owned property in view of the fact the transactions were clear, and a business basis existed in the transactions between the husband and wife. The Court there cited *Stickney v. Stickney*, 131 U. S. 227, 9 S. Ct. 677, 33 L. Ed. 136, to the effect that in the absence of direct evidence, the wife intended a gift, wherever a husband acquired possession of the separate property of his wife, either with or without her consent, he must be deemed to hold it in trust for her benefit. *McCrary v. Heiner* (D. C., W. D. Pa.), 19 Fed. Supp. 575, decided May 3, 1937, is to the same effect as *Richardson v. Helvering*, *supra*. Likewise, *Bremer v. Luff* (D. C., N. D. N. Y.), 7 Fed. Supp. 148, decided October 21, 1923, where the husband and wife had jointly signed mortgage indebtedness given to purchase property.

One can think of few expenses of living more related to business in character than income taxes. They spring in fact from business. Personal transactions are carefully eliminated from their computations. The payment of income taxes on community income is the only transaction involved in the instant case. There is no sound reason to assume the wife intended to pay any portion of these community income taxes with funds other than provided by the community estate. The fact that the wife had no separate estate makes this conclusion abundantly clear.

III.

There Is an Implied Contract Under California Law That the Community Will Pay for the Wife the Tax Assessed on Her Community Income Tax Return or, in the Alternative, Reimburse Her for Payment Thereof.

As is well known, California is a community property state. Section 161a of the Civil Code, State of California, provides that interests of the husband and wife in community property are present, existing and equal interests under the *management and control of the husband*. Since the payment of income taxes on community income is part of the management of the community estate over which the husband is given control, it is a natural presumption the wife acts under his direction in filing an income tax return for half the community income.

Section 171 of the California Civil Code provides the separate property of the wife is not liable for the husband's debts, but is liable for the *necessaries of life* while husband and wife live together. In *Grolemund v. Caf-ferata*, 17 Cal. 2d 679, at 688 (1941), Judge Curtis states:

“A complete reading of all our code sections on community property clearly demonstrates that our community system is based on the principle that all debts which are not specifically made the obligation of the wife are grouped together as the obligations of the husband and the community property . . .”

It is clear from these sections that while the husband has dominion over the community estate, the community estate or the husband's estate must take care of the community expenses of the spouses. Unless intended by her

as gifts, the wife has an actionable claim against the community for any expenditures for the community from her separate estate, other than the necessities of life. Respondent waived examination of Arley M. Burrell at the hearing before the Tax Court, and the Tax Court made no finding she intended a gift when she filed the community income returns in her name, or when she later paid the tax. Clearly, the community income tax obligations derive from the community income and should be defrayed by the community estate. Here again, the evidence is clear and specific as to what community income taxes were paid by Arley M. Burrell and when. She has a just claim for recovery from the community estate for the payment of community income taxes by her.

IV.

Payment by the Wife of Community Income Taxes Is an Adequate Consideration in Money's Worth to Support the Theory of a Contribution by Her to the Joint-Tenancy Estate of the Spouses Into Which the Husband Put His Earnings.

The death of John E. Burrell on July 28, 1943, terminated the joint-tenancy holdings of himself and his wife, Arley M. Burrell. After his death, these properties became the separate property of the surviving wife, Arley M. Burrell.

The community income taxes of the spouses were obligations in money determined by the Commissioner as of March 15, 1943, approximately *four months prior* to the decedent's death. It is with money that Arley M. Bur-

rell paid the amount of \$10,344.12, representing community income taxes, assessed against her for the benefit of the community. This payment was made after the death of the decedent out of her separate estate. She relies upon this fact as being a matter of substance sufficient to be a contribution to the jointly owned properties of the spouses. Surely the substance of it should not be raised by the Commissioner whom the Tax Court held received the money.

The gross estate of the decedent, being limited to his contributions to the joint tenancy properties, amounts therefore to \$123,791.48.

Conclusion.

In conclusion, then, it is clear that the interest of the decedent in the jointly owned property, being limited to his contributions, amounts to \$99,803.75, and that the gross estate of the decedent amounts to \$123,791.48. The consistency thereof is as follows:

Community property	
Stocks and bonds	\$ 60.00
Insurance	6,827.25
Property used in decedent's business	17,100.48
	—————\$ 23,987.73
Jointly owned property	99,803.75
	—————
Total	\$123,791.48
	=====

The petition for review should therefore be granted, and the decision of the Tax Court reversed and the case remanded to the Tax Court with instructions to enter judgment for the petitioner consistent with Section 322(d) of the Internal Revenue Code.

Respectfully submitted,

F. T. RITTER,

Counsel for Petitioner.

Long Beach, California, October 15, 1948.

APPENDIX.

Statutes and Regulations Involved.

Internal Revenue Code:

Section 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(e) Joint and Community Interests.—

(1) Joint Interests.—To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: Provided, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: Provided further, That where any property has been acquired by gift,

bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants.

Civil Code of California:

Section 161a.—Community Property.

The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests *under the management and control of the husband* as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property.

Section 171.—Separate Property of Wife Exempt from Husband's Debts.

The separate property of the wife is liable for her own debts contracted before or after her marriage, but is not liable for her husband's debts; provided, that the separate property of the wife is liable for the payment of debts contracted by the husband or wife for the necessaries of life furnished to them or either of them while they are living together; provided, that the provisions of the foregoing proviso shall not apply to the separate property of the wife held by her at the time of her marriage or acquired by her by devise, succession, or gift, other than by gift from the husband, after marriage.